United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

BRIEF FOR APPELLANT

IN THE

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA

No. 9911

667

DONALD C. LUCKETT,
Appellant

v.

UNITED STATES OF AMERICA,
Appellee

APPEAL FROM THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLUMBIA

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(ME 8-5882)

Attorney for Appellant
(Appointed by this Court)

QUESTION PRESENTED

Whether an incriminating statement given in response to police questioning following an arrest based upon information sufficient to convince the arresting officers that they had apprehended the person for whom they were searching, and a statement given after such an arrest followed by a positive identification by the victim of the crime, are inadmissible due to the failure of the police to inform the arrested person of his rights to silence and to counsel.

INDEX

TABLE OF AUTHORITIES

CASES

STATUTES

MISCELLANEOUS

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*Cases and authorities chiefly relied upon are marked by asterisks.

JURISDICTIONAL STATEMENT

Appellant was tried in November, 1965, in the United States District Court for the District of Columbia and convicted of robbery and assault with a dangerous weapon. The trial court allowed his petition for leave to appeal in forma pauperis. This court has jurisdiction over the appeal by virtue of 28 U.S.C. § 1291.

STATEMENT OF THE CASE

Shortly after four a.m. on the morning of May 10, 1965, Norman McRae, a college student from New Jersey, left the home of his girl friend at 1724 T Street, Northwest, and began walking east on the south side of T Street (Tr. 15-17, 19). When he was about halfway between 14th and 15th Streets, he noticed two people standing on the northwest corner of the intersection of T and 14th Streets (Tr. 18, 20). These two persons crossed to his side of the street. One went behind McRae and the other approached him from the front. When the one confronting McRae was about three feet from him, the man pulled a gun, stuck it under McRae's chin and demanded his money (Tr. 22.) McRae noted that this man appeared "under the influence of some kind," that he had a scar just off the tip of his right eye, and that he smelled "like he hadn't taken a bath in quite some time," (Tr. 23). McRae also noted the man was wearing green O.D. trousers and a knee-length coat that changed color depending on the angle of the light: an "iridescent coat" (Tr. 23-25).

The second man came up from behind McRae and placed a gun--which McRae described as nickle-plated--in his back. McRae "glanced" at this man and testified that he was dressed in an Eisenhower jacket (Tr. 25-26).

The man at his rear took McRae's wallet which contained a twenty dollar bill and a five dollar bill (Tr. 26). The man at his front told him to start running and they "walked moderately" away in the direction from which McRae had come (Tr. 27).

As this episode was terminating, McRae saw a policeman on the corner of 14th and T, and he ran to the officer after being released by the men. McRae told the officer he had been robbed and gave a description of the robbers (Tr. 29). According to the notes made by the officer, this description included the following:

> Number one Negro male, 22 years, five foot eleven, 180 pounds, dark complexion, no hat, wearing a gray long overcoat, light gray pants, black shoes, armed with a long-barrel pistol, rusty in color.
>
> Number two Negro male, 24 years, five foot nine inches tall, 160, dark complexion, waist-length jacket, light gray in color, blue work pants, black shoes (Tr. 63).

McRae also testified that he told the officer of the "iridescent" coat (Tr. 45-46). He also stated that he told the policeman that the "number one" robber was wearing a cap (Tr. 55) although his testimony on this point is contradictory (Tr. 46, 52).

McRae and the officer walked to a call box a couple of blocks away (Tr. 61), during which time McRae apparently supplied additional information concerning the robbers (Tr. 55). At the box the officer called for assistance.

A car containing Officers Dews and Hamilton responded to the call (Tr. 72) and after obtaining a description of the two robbers, they began to cruise the area (Tr. 73-94). Shortly thereafter, Officers Dews and Hamilton received a further transmission from the dispatcher to the effect, according to Dew's recollection, that two persons fitting the description of the robbers had been observed in the 1400 block of "S" Street running west (Tr. 73). They proceeded north on 15th Street and upon seeing a person moving toward 16th Street (either on Swan Street (Tr. 73) or an alley just south of it (Tr. 94, 97-98)), they turned east on Swan Street. After making this turn the officers saw another person running from an alley that intersects Swan. Officer Dews noted that this person fit the description they had of the "number one subject" (Tr. 74, 104). Officer Hamilton observed that as this person ran from the alley, his coat changed color (Tr. 99). The officers stopped the car and ordered him to stop, but he did not. A short chase (about 50 feet) (Tr. 104) ensued before the person was captured (Tr. 74). This person was the appellant.

The point on Swan Street where appellant was apprehended is approximately two blocks from the place where the robbery occurred.

The officers searched appellant for a weapon but found none. They did, however, find a cap, described as a "butch" in the pocket of appellant's coat (Tr. 79). Although Officer Dews testified that he told appellant he was under arrest while Officer Hamilton was conducting this search (Tr. 88), Hamilton clearly testified that the search was completed and the cap found before they placed him under arrest (Tr. 102). Officer Dews also noticed a strong body

odor on the appellant and the smell of alcohol on his breath (Tr. 79-80).

The officers informed appellant that he was under arrest for robbery. He replied that he had not robbed anybody. They then asked why he was running, and appelant said "we had been drinking and didn't want to be arrested for drunk" (Tr. 82, 88).

McRae, the victim, was then brought to the scene by another car, and identified appellant as the robber who had faced him (Tr. 29, 41, 53).

After McRae had identified appellant and Officer Dews had ascertained the amount of money taken in the robbery (Tr. 90), Dews asked him (appellant) if he had any money. Appellant said he did not. Dews then conducted a more thorough search of appellant and found a twenty dollar bill crumpled in his left front pants pocket (Tr. 83, 90, 100). At no time prior to the questioning of appellant did the officers inform him of his right to remain silent (Tr. 84).

At trial McRae, Officer Hamilton, and Officer Dews testified for the government. The government's only exhibit was the twenty dollar bill found on appellant.

When, during the course of Dews' testimony, it became apparent that the government would rely upon the statements appellant made to the officers, the court, after being alerted by defense counsel, held a hearing to determine the admissibility of the statements (Tr. 80, 87). It was in the course of this hearing that Officer Dews, in response to a question asked by the court, admitted that the appellant had not been warned of his rights (Tr. 84). This failure on the part of the officers was pointed out to the court by counsel for

the defense at the close of the hearing (Tr. 86). The government argued these statements to the jury (Tr. 114, 118-119). The court reiterated them in its charge on voluntariness and pointed out to the jury exactly why the government thought them material to the case.[1/]

The appellant did not take the stand and called no witness (Tr. 106-107).

CONSTITUTIONAL PROVISION INVOLVED

Amendment Five:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

1/ The charge on this point was as follows:

> ... When the officer after arresting defendant asked him what he was running for, he is said to have testified: We have been drinking and did not want to get locked up. When asked if he had any money, he is said to have responded no. Thereafter, he was searched and a twenty dollar bill was found in his pants pocket. The first of these statements is offered by the government to show an admission or statement in the nature of an admission that there were in fact two persons involved in the perpetration of the law violation. The second statement, exculpatory in nature, to the effect that he had no money, is offered by the government to show the presence of a guilty mind or criminal intent in that the police say they subsequently found money in the pants pocket of the defendant (Tr. 149).

STATEMENT OF POINTS

The trial judge erred in admitting incriminating statements of the appellant obtained after arrest and prior to the time he was informed of his rights. With respect to this point appellant desires the court to read the following pages of the transcript: Tr. 13-119; 137-153, inclusive.

SUMMARY OF THE ARGUMENT

This case involves the applicability of the Supreme Court's decision in Escobedo v. Illinois to two threshhold statements made in response to police questioning after arrest but prior to the time the arrested person had been advised by the police of his right to silence. It is the contention of the appellant that Escobedo recognizes that there is an absolute constitutional right to silence in the face of police questioning and that at very least after the investigation ceases to become a general inquiry into an unsolved crime the police must inform the accused of this right before questioning him.

In the federal system the law guarantees that an accused person will be informed of this right without unnecessary delay after his arrest and that he will have the guiding hand of counsel to assist him in exercising that right. From this point forward the law carefully insures that the right will not be lost through ignorance. Yet prior to Escobedo the decisions were virtually uniform in holding that the government had no obligation to inform an arrested person that he could not be compelled to incriminate himself during the period when the right to silence is most important--between arrest and presentment.

Escobedo corrected this incongruity. The decision is squarely premised on the notion that "the system of criminal justice can, or should

survive if it comes to depend for its continued effectiveness on the citizens' abdication through unawareness of their constitutional rights." And the extension of the right to counsel--which is the central holding of the case--is justified by the court on this premise. Escobedo requires a waiver of the right to silence, and this, of course, necessitates that the accused be informed of this right.

In this case the statements were obtained after arrest and prior to a warning of any sort that appellant need not speak. One of the statements was obtained after a positive identification of appellant by the victim of the crime. On these facts both statements were inadmissible.

Cases construing Escobedo are not uniform. The question of its scope is now pending decision in the Supreme Court.

Even assuming Escobedo does not require a warning in the circumstances of this case, this court should require it in the exercise of its supervisory authority. Failure to inform an arrested person of his right to silence, inevitably discriminates against the ignorant and inexperienced, who may answer questions simply because they believe the police have the right to compel an answer. Furthermore, there is no evidence that informing people of their rights will seriously impede law enforcement. The FBI always gives a caution. Texas requires a warning by statute. England and Canada require it by rule. The military are required to give a caution by Article 31 of the Uniform Code. In none of these jurisdictions have the police been frustrated in their war on crime, and, in fact, confessions are not at all uncommon.

ARGUMENT

I. THE ARRESTING OFFICER'S FAILURE TO WARN APPELLANT OF HIS RIGHTS RENDERS HIS STATEMENTS INADMISSIBLE.

A. Escobedo v. Illinois Requires The Exclusion of Incriminating Statements Given in Response to Police Questioning After Arrest Unless the Arrested Person Has Been Informed of His Rights.

To appellant's knowledge, this is the first case to reach this court since Escobedo v. Illinois,378 U.S. 478 (1964) involving threshhold statements made in response to police questioning after arrest and prior to a caution that there was no obligation to answer. Appellant does not contend there is any question of unnecessary delay in this case. Neither does he assert that the police are precluded from all questioning at this stage. Nor is it contended that the presence of counsel is always an absolute prerequisite to interrogation, it is not necessary here to go this far. He does contend, however, that after an arrest based upon the information available to the police in this case, and at very least after such an arrest followed by a positive identification by the victim of the crime, the police are required to inform the accused of his absolute constitutional right to silence and of his right to counsel before any questions are asked of him. The following argument is directed primarily to the right to be informed of the right to silence for in appellant's opinion, this is the most critical right he had at this stage.

It seems clear that,as the trial court recognized,the statements made by appellant and introduced by the government are governed by the same rules as full confessions of guilt. They were introduced against him as evidence of

guilt, argued as such by the prosecutor, and the purpose of their introduction was clearly explained by the court in its charge. If such statements differ in effect from a full confession, it is only in the degree, not the fact, of prejudice to the appellant.[2/] The Supreme Court has long considered such statements no different from full confessions and applied to them the same rules governing admissibility.[3/]

Indeed, statements such as these emphasize the value of the right to absolute silence, and explain why "any lawyer worth his salt will tell the suspect in no uncertain terms to make no statement to police under any circumstances."[4/] Unless informed of his right to silence, an arrested person may well assume that he has to give some answer to the police.[5/] Furthermore,

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2/ Thus, if they were improperly admitted, the case must be reversed and a new trial had, see Fahy v. Connecticut, 375 U.S. 85, 86-87 (1963); White v. Maryland, 373 U.S. 59, 60 (1963); Hamilton v. Alabama, 368 U.S. 52, 55 (1961) cf. Porter v. United States, 103 U.S. App. D.C. 385, 258 F.2d 685, 694 (1958), cert. denied, 360 U.S. 906 (1959) (dissenting opinion).

3/ Bram v. United States, 168 U.S. 532, 541, 562 (1897). See Mueller, The Law Relating to Police Interrogation Privileges and Limitations, 52 J. Crim. L.C. & P.S. 1, 3 (1961) where in regard to false and contradictory statements made in response to police interrogation, the author states:

> So much the better! False answers are the wedge which will ultimately split the block.
>
> Involvement in contradictions, false alibis, etc., will render the ultimate conviction of the suspect without his further personal participation relatively easy. (emphasis in original)

4/ Watts v. Indiana, 338 U.S. 49, 59 (1949) (Jackson, J.), (concurring in part and dissenting in part).

5/ See Wong Sun v. United States, 371 U.S. 471, 486 n.12 (1963); United States ex rel Russo v. New Jersey, 351 F.2d 429, 438 (3d Cir. 1965). Note 73 Yale L.J. 1000, 1044 (1964); 78 Harv. L. Rev. 143, 220 (1964).

the fact of arrest itself is inherently coercive[6/] and places upon the arrested person a compulsion to attempt to exculpate himself. This is particularly true of the indigent who tends to be less articulate, less intelligent, and less informed than the more affluent members of our society, and to whom the police are the every day manifestations of authority. If he gives a contradictory statement or makes a verbal slip or tells the police an outright lie in an attempt to answer a question he believes must be answered, this statement may be later turned against him. In short, there is a great danger that an innocent but inarticulate person, apprehended under suspicious circumstances and unaware of his right to silence, will inadvertently convict himself out of his own mouth simply because he believes some answer must be given and does not have one readily available which he believes will satisfy the police.

At trial or any prior proceeding the law carefully guarantees him the right to know that he cannot be compelled to make any statement and to the assistance of counsel if he so desires it. It is incongruous that the law should guarantee him this knowledge at every judicial proceeding--indeed, should require that he receive a judicial warning without unnecessary delay after arrest--yet allow the police to keep him in ignorance of his rights to silence at the one stage when this knowledge may be most effective--between arrest and presentment. However, decisions prior to 1964 are virtually uniform in holding that the police are under no duty to inform an arrested person of his right to

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6/ See Ashcraft v. Tennessee, 322 U.S. 143, 161 (1944) (Jackson, J.) (dissenting opinion).

silence. 7/

Escobedo corrected this incongruity. There the court made it clear that there is an absolute constitutional right to silence 8/ in the face of police questioning and that at very least after the investigation ceases to be "a general

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7/ See e. g. United States v. Wilson, 264 F.2d 104 (2d Cir. 1959); Heideman v. United States, 104 U.S. App. D. C. 128, 259 F. 2d 943 (1958, cert. denied, 359 U.S. 959 (1959); Metoyer v. United States, 102 U.S. App. D.C. 62, 250 F.2d 30 (1957); United States v. Heitner, 149 F.2d 105 (2d Cir. 1945); United States v. Papworth, 156 F. Supp. 842 (N.D. Tex. 1957), aff'd 256 F.2d 125 (5th Cir. 1958), cert. denied 358 U.S. 854. These cases generally rely either on Mitchell v. United States, 322 U.S. 65 (1944) or Powers v. United States, 223 U.S. 303 (1912) and Wilson v. United States, 162, U.S. 613 (1896). (The latter two cases involved proceedings before a magistrate). State cases are collected in Inbau & Reid, Criminal Interrogation and Confessions 164 (1962). For the only two Federal cases holding that a warning is necessary see United States v. Kallas, 272 Fed. 742 (W.D. Wash., 1921) and United States v. Bell, 81 Fed. 830 (C.C. W.D. Tenn., 1897). Apparently, the only State which required a warning was Texas and this by statute, not decision. Texas Ann. Code, Crim. Procedure Art. 727 (enacted in 1907).

8/ The Court's holding in Escobedo settles once and for all the question of whether the self-incrimination clause includes the right to silence in the face of police questioning. See Kennedy v. United States 119 U.S. App. D.C. 142 353 F.2d 462, 466 n. 8 (1965). For various arguments on both sides of this question see Kasimar, Equal Justice in the Gatehouses and Mansions of American Criminal Procedure, printed in Criminal Justice in Our Time 25-23 (1965) (does apply); Weisberg, Police Interrogation of Suspected Persons, 52 J. Crim. L.C. § P.S. 21, 22 (1961) (does apply); Morgan, The Privilege Against Self-Incrimination, 34 Minn. L. Rev. 1, 27-28 (1949) (does apply); 8 Wigmore, Evidence § 2252 (McNaughton, Rev. 1961) (does not apply); McNaughton, the Privilege Against Self-Incrimination, Its Constitutional Affectation, Raison d'etre and Miscellaneous Implications, printed in Sowle, Police Power and Individual Freedom 233, 238 (1962) (entire argument is a quibble). The Federal cases overwhelmingly support the application of the clause to persons in police custody. See Bram v. United States 168 U.S. 532 (1897); Haley v. Ohio, 332 U.S. 596, (1948); Malloy v. Hogan 378 U.S. 1, 7 (1964); Holland v. Garden 226 F. Supp. 654, 655 (D. Ore. 1963), aff'd 338 F.2d 52 (9th Cir. 1964). See also Model Code Evidence, Rule 203 and p. 174 (1942); Morgan & McGuire, Cases and Materials on Evidence, 425-27 (3d ed. 1951); Note, 5 Stan. L. Rev. 495 (1953).

inquiry into an unsolved crime" the police must at a minimum inform the accused of his right to silence and to the assistance of counsel before commencing an interrogation. There can be no doubt about the fact that Escobedo predicates the right to counsel upon the right to silence guaranteed by the Fifth Amendment and the judgment of the court that this right is useless unless one knows he has it:

> We have also learned the companion lesson of history that no system of criminal justice can, or should, survive if it comes to depend for its continued effectiveness on the citizens' abdication through unawareness of their constitutional rights. No system worth preserving should have to fear that if an accused is permitted to consult with a lawyer, he will become aware of, and exercise these rights. If the exercise of constitutional rights will thwart the effectiveness of a system of law enforcement, then there is something very wrong with that system. 9/

In his dissent, Mr. Justice White emphasized the extent of the court's holding:

> At the very least the court holds that once the accused becomes a suspect and, presumably is arrested, any admission made to the police thereafter is inadmissible in evidence unless the accused has waived his right to counsel (378 U.S. at 465).

Although this remark was directed toward the right to counsel, it is also applicable to the right to silence. Indeed, the court's opinion seems to assume the existence of the Fifth Amendment right throughout the confrontation with the police. At very least it attaches at the time the police become

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9/ 378 U.S. at 490. See also Trilling v. United States, 104 U.S. App. D.C. 159, 260 F.2d 677, 695 (1958) (Opinion of Bazelon, J.).

sufficiently satisfied that they have their man to place him under arrest. As this court has only recently observed "[o]rdinarily, arrest is the culmination, not the beginning of police investigation."[10/] Once there is a constitutional right to silence, Escobedo holds that it must be waived prior to police questioning. This, of course, means that the arrested person must be made aware that the right exists.

It is erroneous to read Escobedo's sweeping concern with an arrested person's awareness of his right to silence as requiring the police to inform him of the right only prior to embarking upon a process of interrogations consciously designed to elicit a confession. If the right exists at all as a thing of value, it exists at every stage of police questioning, at least subsequent to arrest, whether that questioning is an apparently casual inquiry immediately after arrest or a more organized inquisition some time later in an interrogation room. To be at all meaningful, the right to silence cannot depend upon the number of questions asked nor the motives of the police in asking them. At every stage of police questioning following arrest, there is a right to silence. Escobedo stands for the proposition that this is a constitutional right and that the accused must be made promptly aware of it.[11/]

10/ Greenwell v. United States, 119 U.S. App. D.C. 43, 336 F.2d 962 (1964), cert. denied, 380 U.S. 923 (1965).

11/ See 78 Harv. L. Rev. 142, 220 (1964); Kasimar, Equal Justice in the Gatehouses and Mansions of American Criminal Procedure, supra, note 8 at 66-67. Escobedo articulates a constitutional requirement applicable to both the State and Federal systems. In the Federal system the requirement of Rule 5(a) prevents any unnecessary delay in providing an accused with a judicial warning of his rights. As applied to a Federal case, the requirement of at least a police warning in Escobedo fills the interstice between arrest and presentment, thus insuring that the ignorance will not result in incrimination at any stage.

The adequacy of the police warning and other problems surrounding the question of an intelligent waiver are complex. However, this case raises no such questions, for it is absolutely clear that the appellant was not informed of his rights.

The circumstances of this case make it clear that at the time appellant made the statements introduced against him at trial the police had completed their general inquiry into an unsolved crime and that the process had shifted from investigatory to accusatory. Shortly after the officers stopped appellant, they were in possession of enough information to be reasonably certain that he was their man. When they first saw him, Officer Dews observed that he fit the description of the "number one subject." He was only two blocks from the scene of the robbery at an hour when few people are on the street. He was running from an alley. Furthermore, Officer Hamilton testified that as appellant emerged from the darkness of the alley, his coat changed color (Tr. 99). Officer Dews stated that upon apprehending appellant he noticed a strong body odor and the odor of alcohol on his breath (Tr. 79-80). The victim, McRae, testified that he told the police that the man who robbed him was wearing an "iridescent coat" (Tr. 45-46), and since he had also noted the odors about his robber and had ample time to include these (as well as the scar) in his description, it is probable that the officers also had this information. The officers were, in fact, so convinced that they had one of the men who had robbed McRae that they placed him under arrest for robbery(Tr.82). It was not until after the arrest that the officer asked appellant why he was running and received the answer that was later introduced into evidence.

Subsequently, McRae was brought to the scene and postively identified appellant as the man who had robbed him (Tr. 29, 41, 53). After this identification the officers clearly knew they had their man. At this point the crime was solved so far as they were concerned. In fact, except for his subsequent statement and the money uncovered by the search, the officers were in possession of all the evidence which later went to the jury. However, appellant was still not cautioned of his rights. Rather, the officers, as a prelude to a more thorough search, asked him if he had any money. This question was clearly designed to place the appellant between the rock and the whirlpool. If he produced either a five or a twenty dollar bill the officers had another link in the already long chain of evidence against him. If he denied that he had money, they would search him anyway. And if money were found they would have both it and a statement.[12/] As it turned out the latter was the case, and appellant's statement went to the jury, as the trial judge explained, "to show the presence of a guilty mind or criminal intent" (Tr. 149).

It seems quite clear that this second statement falls squarely within the rule of Escobedo. In fact, it seems inconceivable that with the information the police had at this point, there could be any doubt that the appellant had become an accused man. When the police asked him if he had any money, they were not pursuing a general inquiry into an unsolved crime; they were attempting to gather additional evidence against the appellant. At very least appellant was, at this stage, entitled to be informed of his right to silence.

12/ See Mueller, supra, note 3.

Likewise, appellant was entitled to be informed of his rights before being asked the first question. The police had sufficient cause to arrest him for robbery, and upon arrest they should have told him what his rights were. Because of their failure to so inform him, the statements were inadmissible and appellant is entitled to a new trial.

The judicial decisions since Escobedo are by no means uniform. The States have been reluctant to read the case as requiring an informed waiver of the right to silence, although California,[13/] Oregon,[14/] Rhode Island,[15/] Pennsylvania,[16/] and Tennessee[17/] have held that Escobedo requires that the accused be informed of his rights prior to police interrogation. California, however, has refused to exclude threshhold confessions for failure to so inform.[18/] Federal courts are likewise not uniform on this question. In United States ex rel. Kemp v. Pate, the Northern District of Illinois squarely held that the Supreme Court's decisions "require the exclusion from evidence of any confession obtained by interrogation prior either to a

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13 / People v. Dorado, 62 Cal. 2d 338, 398 P. 2d 361 (1965) cert. denied 381 U.S. 946

14 / State v. Neely, 239 Ore. 487, 398 P. 2d 482 (1965).

15 / State v. DuFour, __ R.I. __ 206 A. 2d 82 (1965).

16 / Commonwealth v. Negri, 419 Pa. 117, 213 A. 2d 670 (1965).

17 / Campbell v. State, 384, S.W. 2d 4, 8-9, (1964).

18 / People v. Cotter, 46 Cal. Reptr., 622, 405 P. 2d 862 (1965). This decision construes Escobedo narrowly and holds that until a "process of interrogation" has commenced an arrested person may be kept ignorant of his rights.

constitutional warning by the interrogating officer, or, in the alternative, presentment before a magistrate where such a warning is given."[19] The Fourth Circuit has likewise indicated that Escobedo requires the police to advise an accused of his rights prior to any questions following arrest,[20] as has the Third in a well documented and well reasoned opinion.[21] Although these cases did not involve threshhold confessions, they each clearly indicate that in the absence of a warning such confessions would be inadmissible. On the other hand, the Second Circuit has recently held that threshhold confession made by an unwarned accused is not inadmissible under Escobedo.[22] However, this opinion is the result of too narrow a reading of Escobedo, and a reluctance to view it as a departure from established precedent. Appellant does not believe this case can be meaningfully distinguished. He does strongly urge that it was wrongly decided and should not be followed. It is also out of harmony with the decisions of this court which have placed renewed emphasis upon the right of an accused to be meaningfully informed of his right to silence.[23]

19/ 240 F. Supp. 696, 707 (N.D., Ill., 1965).

20/ Miller v. Warden, 338 F.2d 201, 204-05 (1964).

21/ United States ex rel. Russo v. New Jersey, 351 F.2d 429, 438 (1965).

22/ United States v. Cone, 354 F.2d 119 (1965).

23/ Alston v. United States, 120 U.S. App. D.C. 63, 348 F.2d 72 (1965); Greenwell v. United States, 119 U.S. App. D.C. 43, 336 F.2d 962 (1964); compare Jackson v. United States 119 U.S. App. D.C. 100, , 337 F.2d 136 (1964); cert. denied 380 U.S. 935 (1965); Long v. United States 119 U.S. App. D.C. 209 338 F.2d 549 (1964).

The question of the scope of Escobedo and the requirement of a meaningful caution that an accused may remain silent is now pending decision in the Supreme Court. [24] Although none of these cases involves a threshhold confession, the point at which a warning is constitutionally required has been argued, and the court's decision may well be dispositive of this case. Although appellant does not believe that the briefing schedule should be delayed until the Supreme Court reaches a decision in these cases, he does believe that this court should not decide the case until the Supreme Court has acted and should have the benefit of a memorandum on its decision. Counsel will move for permission to file such a memorandum if this case is still pending when they are decided.

B. Assuming Escobedo Does Not Require the Exclusion of Confessions Obtained by Police Questioning of Uninformed Persons After Arrest, This Court Should Do So in the Excercise of its Supervisory Authority.

Even assuming Escobedo does not require a warning in the circumstances of this case, this court should, in the exercise of its supervisory authority over the administration of justice in the District of Columbia, [25] require that an arrested person be informed of his right to silence before the police question him. This court has recently excluded a threshhold confession given by an unwarned accused on Mallory grounds, [26] and in so doing clearly indicated the importance it attaches to a prompt caution that an arrested person has an absolute right to remain silent. If such a right exists -- whether as constitutional right or not -- any rule which allows the police to question an arrested

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24/ Miranda v. Arizona, et al, Nos. 659-62, 584. A resumè of the oral argument in these cases is reported in 34 U.S. Law W. 3297 (March 8, 1966).

25/ See Griffin v. United States, 336 U.S. 704 (1949); Fisher v. United States, 328 U.S. 463 (1946).

26/ Alston v. United States, 120 U.S. App. D.C. 63, 348 F.2d 72 (1965).

person prior to informing him of this right "inevitably discriminates against the ignorant and inexperienced who may answer questions without any apparent coercion simply because they believe that the police have the authority or power to make them." 27/ Professor Kasimar has concisely summed up appellant's position:

> I do not claim that the State has an obligation to prevent a suspect from incriminating himself. I do contend that it must insure that the suspect is aware that he need not, and cannot be made to incriminate himself. I do not claim that the State should, or even that it can, eliminate all the subtle and personal "inequalities" which disadvantage some suspects of police interrogation more than others. I do contend that so far as it is reasonably possible the State can and should insure that the choice of the weak and the ignorant and the poor to speak or not to speak is as free and as informed as that of their more fortunately endowed brethern. 28/

This view is an extremely reasonable one and clearly in accord with the spirit, if not the letter, of the Supreme Court's decision in Escobedo. Indeed, it would remove much of the difficulty in the administration of the Escobedo rule in the District of Columbia. Furthermore, it would discourage the police from attempting to "roll back" the Escobedo doctrine under the guise of investigation,

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27/ State ex rel. Russo v. New Jersey, 351 F. 2d 429, 438 (3d Cir. 1965). See authorities cited therein.

28/ Kasimar, supra, note 8, at 10.

as has been the case in England where admissibility of a confession obtained in violation of the Judge's Rules.[29] is a matter of discretion with the court.[30]

Furthermore, there is no convincing evidence that requiring the police to inform an arrested person of his rights would seriously hamper police work. The FBI always gives such a warning upon arrest,[31] and there is no indication that this has shut off the flow of confessions obtained by its agents.[32] Furthermore, Texas [33] and Canada [34] exclude confessions not proceeded by a warning of rights, and appellant has discovered no evidence

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29/ [1964] All Eng. Reps. 237, 238:

> 2. As soon as a police officer has evidence which would afford reasonable grounds for suspecting that a person has committed an offense, he shall caution that person or cause him to be cautioned before putting to him any questions, or further questions relating to that offense.
>
> The caution shall be in the following terms:
>
> "You are not obliged to say anything unless you wish to do so but what you say may be put in writing and put in evidence."

For earlier statements of the rule see 10 Halsbury's Laws of England, 471 (3d Ed. 1955).

30/ See Inbau, Restrictions in the Law of Interrogation and Confessions, 52 N. W. Univ. L. Rev. 77, 83-84 (1957).

31/ See Hoover, Civil Liberties and Law Enforcement: The Role of The FBI, 37 Iowa L. Rev. 175, 182 (1952).

32/ See e.g. Jackson v. United States, 119 U.S. App. D.C. 100 , 337 F.2d 136 (1964), cert. denied 380 U.S. 935 (1965); Greenwell v. United States, 119 U.S. App. D.C. 43 , 336 F.2d 962 (1964); United States v. Ruehrup, 333 F.2d 641 (7th Cir.) cert. denied, 379 U.S. 903 (1964).

33/ Texas Ann. Code Crim. Proc., Art. 727.

34/ Gach v. R. [1943] Can. Sup. Ct. Reps. 250, 79, Can. Crim. Cas. 221, 225.

that law enforcement has been impaired in those jurisdictions. India, of course, goes to the extreme of disallowing all confessions made to a police officer [35/] and even here there is no indication that her system of law enforcement is breaking down. The Uniform Code of Military Justice requires that any accused or suspected person must be informed of his right to silence before any questions are asked, and expressly makes any statement obtained in violation thereof inadmissible. [36/] The administration of military justice has not been impaired by this requirement and, in fact, confessions are commonplace in the armed services. Finally, appellant is informed that the Metropolitan Poice are now instructed to warn an arrested person before questioning begins. Thus, such a rule should have no practical effect upon the efficiency of the police force.

In short, the advantages of a rule requiring that arrested persons be made aware of their rights upon arrest far outweigh the practical disadvantages to the efficient operation of the police force. [37/] In any event, the practice of agents of the government keeping a person in ignorance of his rights in hopes that through this ignorance he will incriminate himself in response to a question which apparently commands an answer with all the authority of the State is a dangerous one, totally incompatible with the concept of equal justice.

35/ India Evidence Act, 1872 §§ 25, 26.

36/ Uniform Code of Military Justice, Art. 31, 10 U.S.C. § 831.

37/ For a well reasoned answer to the literature suggesting that the policy of the Bill of Rights is today too inconvenient to be tolerated, see Sutherland, Crime and Confession. 79 Harv. L. Rev. 21 (1965).

CONCLUSION

For the above reasons appellant submits that the conviction must be reversed and the case remanded for a new trial.

Respectfully submitted,

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Counsel for Appellant
(Appointed by this Court)

BRIEF FOR APPELLEE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 19,911

DONALD D. LUCKETT, JR., APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

Appeal from the United States District Court for the District of Columbia

---

DAVID G. BRESS,
United States Attorney.

FRANK Q. NEBEKER,
JOHN H. TREANOR, JR.,
ROBERT KENLY WEBSTER,
Assistant United States Attorneys.

Cr. No. 607-65

QUESTION PRESENTED

In the opinion of the appellee, the following question is presented:

May appellant for the first time on appeal challenge the admissibility of two threshold statements, ruled voluntary by the trial court, on the grounds that he had not been forewarned by the arresting police at the scene of his capture of his right to remain silent, where a) the record is incomplete on whether appellant was warned of his rights; b) trial counsel, though aware that appellant might not have been so warned, deliberately chose not to ventilate the issue and it was not explored; and c) as a matter of trial tactics defense counsel used one of the statements, which was exculpatory in nature, to his client's advantage in closing argument? If so, was it plain error to admit into evidence these statements, to which defense counsel declined to object and which he considered "not harmful" and "not damaging", as violating the teaching of existing case law?

INDEX

TABLE OF CASES

* Cases chiefly relied upon are marked by asterisks.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 19,911

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v.

UNITED STATES OF AMERICA, APPELLEE

Appeal from the United States District Court for the District of Columbia

---

BRIEF FOR APPELLEE

COUNTERSTATEMENT OF THE CASE

At about 4:18 in the early morning of May 10, 1965 Naman McRae, a college student from New Jersey, was robbed on a public street by two gunmen, one of whom thrust the barrel of a pistol into his throat while the other, holding a gun in his back, removed his wallet (Tr. 14, 15, 18, 25, 32). Shortly thereafter appellant was arrested near the scene of the crime (Tr. 71-78). He was taken later that morning to the Court of General Sessions and following a preliminary hearing at which he was represented by counsel, he was held for the action of the grand jury. By indictment filed June 1, 1965 appellant

was charged with one count each of Robbery (22 D.C. Code § 2901) and Assault with a Dangerous Weapon (22 D.C. Code § 502). On July 13, the day originally set for trial, appellant was not delivered up from jail because he had become violent. The Court that day ordered appellant to undergo a 60-day mental observation at Saint Elizabeths Hospital and based on testimony adduced at a hearing held September 20, he was found mentally competent to stand trial. On November 3 appellant was convicted by a jury of both counts of the indictment and received concurrent sentences of from three to ten years.

The complainant, Mr. McRae, had arrived in the District the day before the robbery to visit his future wife and had enjoyed a liquor-free evening attending a movie and watching the Late Show on television (Tr. 14, 15, 33, 59). After a rest on the couch he left her home at 1724 T Street, Northwest, five or six minutes after 4 a.m. to catch a cab to the Trailways bus station, intending to return north in time to work his 11 a.m. shift at Howard Johnson's Restaurant in Morristown, N.J. (Tr. 15, 16, 17, 32). Half way down the 1400 block of T Street, appellant approached him directly from the front and when about three feet away drew his gun and, shoving it underneath Mr. McRae's chin into his throat, said, "Be cool, all I want is your cash" (Tr. 18, 19, 21, 22). Appellant pushed his victim from under a streetlight towards a near-by tree where Mr. McRae, who doesn't wear glasses, got a good look at his assailant (Tr. 22, 35) and was able to provide an excellent description.

Appellant, approximately 22 years old, bore a telltale scar off the tip of his left eye (Tr. 23, 27, 38, 46-48).[1] He was estimated to be five feet eleven inches tall, weighing 180 pounds and he was wearing green khaki pants,

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[1] As shown at trial the scar was accurately described except that instead of being off the tip of the right eye, as Mr. McRae testified, it was actually located off the tip of the left eye (Tr. 23, 27, 38, 47, 48).

an irridescent knee length coat that changed colors when it hit the light, and a cap with a short bib that fitted snugly on his head (Tr. 23, 24, 49, 63). The cap was "dirty" (Tr. 49). Being very close, Mr. McRae could also smell an odor "like he hadn't taken a bath in quite some time" and in addition noted that appellant seemed "under the influence of some kind" (Tr. 23). The gun was rusty and Mr. McRae recognized it from his military familiarity with firearms to be an old long barrel .22 Caliber weapon (Tr. 21, 34).

A second man approached Mr. McRae from behind, stuck something into his back, removed his wallet and, fumbling, dropped both the wallet and what appeared to be a shiny, nickel-plated automatic pistol (Tr. 18, 25). At this time Mr. McRae got a brief look at the second man, so that he was later able to give the police a description of height, weight, clothing and age (Tr. 25, 26, 28, 63). After the wallet had been retrieved, and had been looted of a five dollar bill and a twenty dollar bill "more or less stuffed in there", and had been thrown to the ground, Mr. McRae was asked by appellant if he knew how to run (Tr. 26, 27). Scooping up his empty wallet, Mr. McRae demonstrated his ability (Tr. 27). By chance Patrolman David A. Poppen, walking his beat, had just arrived at the nearby corner of 14th and T Streets (Tr. 27, 58, 59). The complainant, badly frightened, raced directly for the uniformed officer, his pants pocket still inside out (Tr. 27, 59, 60). Appropriately enough for this time of night there was no vehicular traffic and there were no other pedestrians (Tr. 22, 43).

Officer Poppen took down a description of the robbers on the way to the call box (Tr. 45, 61). Police radios flashed a general broadcast at 4:22 about four minutes after the crime occurred (Tr. 61). Shortly thereafter appellant, fleeing the scene of the crime, was caught by Officers Edgar B. Dews, Jr., and Thomas L. Hamilton who had responded to the hunt in their scout car. (Tr. 71-78). Mr. McRae was then transported to the place

of arrest where he positively identified appellant, then coatless[2] (Tr. 29, 46).

Officer Dews testified that, forewarned with a description broadcast over the police radio and with a further description supplied by Officer Poppen in the company of the complainant, he and his partner followed up a report that two suspects had been seen running down the 1400 block of S Street (Tr. 72, 73). While proceeding westward along Swann Street, approximately two blocks from the scene of the crime, he saw a man running along the street in the same direction (Tr. 73-76). Appellant, also on the run, came out of an alley behind this first man and headed eastward passing within a few feet of the scout car (Tr. 74, 75). He wore a coat that "seemed to change with the light" from "grey" to "bluish green" (Tr. 77, 78). Thrice appellant was ordered to halt and he ignored each command (Tr. 74). Only when the officers, after a short chase, threatened to shoot, did appellant turn to see his pursuers closeby on foot and halt (Tr. 74). Officer Dews noted that appellant was perspiring profusely, had a strong body odor and, although not drunk, smelled of alcohol (Tr. 79-80). He was searched immediately for weapons but none were recovered (Tr. 102, 103). His coat was removed and a butch cap with a small bill that fits flat was found in its lining (Tr. 78, 79, 99). The hat was "dirty" (Tr. 89, 99).

The first of the two statements which are the core of the instant appeal was made to Officer Dews immediately after appellant was stopped. When accused of robbery, appellant denied robbing anyone; upon being questioned why he was running, he responded, "We were running from the police because we were afraid we would be locked up . . . for drinking" (Tr. 82, 88). Appellant was taken to the nearby squad car, and after the complainant arrived and made a positive identification, ap-

[2] The officers had removed the coat to search for weapons (Tr. 99).

pellant was asked if he had any money, to which he responded, in the second statement questioned on appeal, that he did not (Tr. 83, 90, 100). Appellant was then searched and his left front pants pockets contained a crumpled bill (Tr. 90, 91). Its denomination was $20 (Tr. 90). When Officer Dews asked "What's this?", appellant answered him with silence (Tr. 90).

Appellant did not take the stand (Tr. 106). He offered no evidence (Tr. 107).

Prior to any testimony concerning the foregoing two statements, defense counsel, upon becoming aware that statements appellant made to the police officer were going to be put into evidence, requested a bench conference (Tr. 80). A hearing outside the presence of the jury resulted. The Court stated it would "have to ascertain whether any statements made were voluntary" (Tr. 80, 81). The circumstances surrounding their declaration were then related by the officer (Tr. 81-83). Thereafter defense counsel declined the opportunity to ask the officer any questions (Tr. 83). At this point the voluntariness of the statements had been the sole objective of the questioning. Then, however, the Court asked Officer Dews "Did *you* at any time warn him that anything he said might be used against him?" (Tr. 84) (Emphasis added). Officer Dews responded "No, sir, not at that time, *I didn't*" (Tr. 84) (Emphasis added). Officer Hamilton, however, was present at the instant of arrest and thereafter, but he was not called to testify on this point (Tr. 82, 93-104). This was the only question asked at trial that related to appellant being warned of his rights (Tr. 84-85).

At the end of the testimony, the Court invited argument. The government urged briefly that the statements were clearly voluntary, and the defense, in its comments, noted offhand that appellant "hadn't been advised of any particular rights he had" and concluded that the statements "in my view, are not damaging at all" (Tr. 85, 86). The Court then pressed counsel for a clarification of his views (Tr. 86). Defense counsel re-

sponded unequivocally, "I take the position . . . that there was no coersion here, physical or psychological" (Tr. 86).

Defense counsel did not object to the statements on the ground urged on appeal or on any other grounds either at the end of the *voir dire* or upon their introduction into evidence (Tr. 88, 89).

In closing argument the government reminded the jury of both the statements (Tr. 114, 117, 135). Defense counsel in his closing argument contended that appellant's statement about why he was running constituted a reasonable explanation of what he was doing and why he was innocent (Tr. 121). This was consistent with counsel's view, expressed after a night's reflection between the end of the testimony at the *voir dire* and argument, that appellant's explanation of flight was "certainly not harmful" (Tr. 85, 86).

Having ruled the statements voluntary, the Court instructed the jury not to consider any statement the appellant made unless they believed beyond a reasonable doubt that it was voluntary in character (Tr. 149). In addition that Court commented that the purpose of the government in introducing the first statement was to show that there were two persons involved in the crime and the purpose of the second statement, exculpatory in nature, was to show the presence of a guilty mind or criminal intent (Tr. 149).

SUMMARY OF ARGUMENT AND ARGUMENT

I. Having declined in the trial court to raise and explore the issue of whether appellant was warned of his right to silence before making two voluntary threshold statements, appellant is barred from raising the issue for the first time on appeal; in any event, even assuming appellant was not warned, existing case law sanctions the introduction into evidence of these voluntary threshold statements.

(Tr. 81-88, 93-104, 121)

Appellant, reversing the judgment of his trial counsel, challenges for the first time on appeal two statements

he made at the scene of his capture, the first voiced immediately upon being caught in which he explained his reason for running from the police, and the second uttered a short time later, following identification by the complainant, in which he falsely denied having any money (Tr. 81-83, 85, 86). Both statements were ruled voluntary by the trial court after testimony was taken out of the presence of the jury (Tr. 86, 87), and appellant presents on appeal only the narrow issue of whether the police must warn an arrested accused of his right to silence as a prerequisite to the admissibility of any statement made by the accused which the government seeks to use against him.

The trial court asked the only question concerning whether appellant was warned of his right to silence:

> THE COURT: Did you at any time warn him that anything he said might be used against him?
> THE WITNESS: [Officer Dews] No, sir, not at that time, I didn't (Tr. 84).

The record clearly shows that, although aware of it, defense counsel elected not to explore this issue. He declined the opportunity to cross-examine Officer Dews (Tr. 84). Furthermore, after a night's reflection and after observing to the Court that appellant was not advised by Officer Dews of his "particular rights", he voiced no objection to either statement, preferring to conclude his remarks with "there was no coersion here, physical or psychological" (Tr. 85, 86).

The statements were later introduced into evidence without objection. Thus the record is incomplete as to whether someone else might have advised appellant of his right to silence. Officer Dews spoke only for himself when asked if *he* at any time warned appellant. In fact, the officer's answer is not entirely responsive because he implied that he did warn appellant at some time. Defense counsel did not choose to resolve this ambiguity; nor did he choose to call Officer Hamilton, who was pres-

ent throughout the arrest and testified at trial, to determine if that officer had warned appellant (Tr. 82, 93-104). This Court held that under circumstances where the record did not show whether the prosecution or the defense sought to ventilate the issue of a defendant being warned of his right to remain silent, it "cannot reverse". *Pea* v. *United States*, 116 U.S. App. D.C. 410, 324 F.2d 442 (1963), *vacated on other grounds*, 378 U.S. 422 (1964). *A fortiori* the same result is compelled where, as here, an affirmative decision was made not to ventilate the issue.

But there are additional reasons why appellant's argument does not compel reversal. In closing argument trial counsel turned to his client's advantage the first of appellant's statements, that "We were running from the police because we were afraid we would be locked up . . . for drinking" (Tr. 88, 121). All of defense counsel's actions indicate that as a matter of trial tactics counsel did not want this exculpatory statement excluded, for, appellant not having taken the stand, it provided an explanation of appellant's flight from the police which could not otherwise have been brought to the jury's attention. In fact appellant's trial strategy suggests that if the government had failed to introduce the statement, defense counsel would have done so. This Court has often held that trial tactics are not reviewable on appeal. See *e.g.*, *Bolden* v. *United States*, 105 U.S. App. D.C. 259, 266 F.2d 460 (1959) (trial counsel's refusal to call a defense witness not subject to reexamination on appeal); *Mitchell* v. *United States*, 104 U.S. App. D.C. 57, 259 F.2d 787, *cert. denied*, 358 U.S. 847 (1958) (trial tactics are not judiciable issues on appeal).

Furthermore, having elected not to object to the statements at trial, appellant must assert that their introduction into evidence was plain error under F. R. Crim. P. 52(b) such as to compel reversal. This Court and others have shown their firm reluctance in the field of admissions to reverse under these conditions. *Coor* v. *United States*, 119 U.S. App. D.C. 259, 340 F.2d 784 (1964); *United*

States v. *Indiviglio*, 352 F.2d 276 (2d Cir. 1965 *en banc*) (appeal pending). The caliber of the two statements as evidence supporting the government's case, when balanced against the overwhelming evidence of guilt—accurate, corroborated identification by height, weight, age, scar, pants, coat, cap, smell, together with fruits of the crime and continued flight even in the face of the officer's commands to halt—does not warrant reversal even if the statements were not properly admitted, which they were. This is particularly true since one of the statements was used to appellant's benefit. In his remarks to the Court out of the jury's presence, appellant's own counsel evaluated the two statements as "not damaging at all" and "not harmful" (Tr. 86).

It is clear, however, that existing case law sanctions the use of the challenged statements. Appellant's reliance on *Escobedo* v. *Illinois*, 378 U.S. 478 (1964) as authority for excluding threshold statements is not convincing, for the precision used by the Supreme Court to limit its finding clearly shows that the case held only that a confession is inadmissible where

> the police carry out a process of interrogation . . . that lends itself to eliciting incriminating statements, the suspect has requested and been denied an opportunity to consult with his lawyer, and the police have not effectively warned him of his absolute constitutional right to remain silent . . . . 378 U.S. at 490-91.

Here, in sharp contrast to the interrogation at the police station in *Escobedo*, Officer Dews asked brief, routine and casual questions at the scene of capture after informing appellant of the reason for his detention. The first question was designed to insure that the suspect was actually the robber and the second, following identification by the complainant, was designed to locate the fruits of the crime. In effect, *Escobedo* excludes from state trials con-

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[3] *Mallory* v. *United States*, 354 U.S. 449 (1957)

fessions that would be barred from the federal courtroom under the *Mallory*[3] rule. *Williams* v. *United States*, 120 U.S. App. D.C. 244, 245-47, 345 F.2d 733, 734-36 (1965) (concurring opinion of Burger, J.). No case known to appellee has held that statements voluntarily made on the public street shortly after capture are inadmissible.

The police in every case need not advise an arrested suspect of his right to remain silent and not even *Escobedo* can be read that broadly. See *Wilson* v. *United States*, 162 U.S. 613, 623 (1896); *(John) Jackson* v. *United States*, 119 U.S. App. D.C. 100, 104, 337 F.2d 136, 140 (1964), *cert. denied*, 380 U.S. 935 (1965). The Court of Appeals in the Second Circuit, *en banc*, held a threshold confession admissible although the defendant had not been advised of his right to remain silent. *United States* v. *Cone*, 354 F.2d 119 (2nd Cir., 1965 *en banc*). This Court in *dictum* has suggested the same result. *Kennedy* v. *United States*, —— U.S. App. D.C. ——, 353 F.2d 462, 464-66 (1965); *cf. United States* v. *Robinson*, 354 F.2d 109 (2nd Cir. 1965 *en banc*) (Statement made at police station after arrest on the street held admissible despite failure to warn defendant of right to silence). Appellant's statements were properly received in evidence.

CONCLUSION

WHEREFORE, it is respectfully submitted that the judgment of the District Court should be affirmed.

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